STATE OF WISCONSIN
SUPREME COURT

In the Matter of:

The Petition of the Wisconsin Association of Criminal Defense Lawyers, the Wisconsin Association of Justice, Fran Deisinger, Paul Swanson, Chris Rogers, Jon Axelrod, Louis Butler, Keith Findley, Frank Gimbel, Janine Geske, Walter Kelly, Peg Lautenschlager, John Chisholm, Kelly McKnight, Dean Strang, Jerry Buting, E. Michael McCann, Daniel Blinka, Jim Brennan, Ben Kempinen, John Skilton, James Boll, Ralph Cagle, Robert Gagan, Diane Diel, Tom Sleik, Gerry Mowris, Gerald O'Brien, Mike Steinle, Howard Pollack, Tom Streifender, Joseph Tierney, Christy Brooks, for an amendment to Supreme Court Rule 81.02 changing the hourly rate of compensation for court-appointed lawyers to $100/hour, indexing that rate to annual cost of living increases, and specifying that the payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02 for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable.

PETITION TO AMEND SUPREME COURT RULE 81.02

To: The Honorable Justices of the Wisconsin Supreme Court

The Wisconsin Association of Criminal Defense Lawyers, the Wisconsin Association of Justice, and the following members in good standing of the Bar of this Court: Fran Deisinger, Paul Swanson, Chris Rogers, Jon Axelrod, Louis Butler, Keith Findley, Frank Gimbel, Janine Geske, Peg Lautenschlager, John Chisholm, Kelly McKnight, Dean Strang, Jerry Buting, E. Michael McCann, Dan Blinka, Jim Brennan, Ben Kempinen, John Skilton, James Boll, Ralph Cagle, Robert Gagan, Diane Diel, Tom Sleik, Gerry Mowris, Gerald O'Brien, Ben Kempinen, Mike Steinle, Howard Pollack, Tom Streifender, Joseph Tierney, Christy Brooks, by their attorneys, **John A. Birdsall of Birdsall Law Offices, S.C., and Henry R. Schultz of Schultz Law Office,** petition this Honorable Court to amend Supreme Court Rule 81.02 accordingly:

1. Change the hourly rate of compensation for court-appointed lawyers to $100/hour;
2. Include a provision indexing future compensation rates to annual cost of living increases; and,

3. Include a provision specifying that any payment for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin statutes section 977.08 of an hourly rate less than the rate set forth in Supreme Court Rule 81.02 is unreasonable.

SCR 81.02 COMPENSATION (PROPOSED)

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(1) ~~Except as provided under sub. (1m), a~~ [A]ttorneys appointed by any court to provide legal services for that court, for judges sued in their official capacity, for indigents and for boards, commissions and committees appointed by the supreme court shall be compensated at a rate of ~~$70 per hour or a higher rate set by the appointing authority. The supreme court shall review the specified rate of compensation every two years~~ $100/ hour or a higher rate set by the appointing authority. The minimum hourly rate shall be indexed and raised annually consistent with cost of living increases.

~~(1m) Any provider of legal services may contract for the provision of legal services at less than the rate of compensation under sub. (1).~~

(2) The rate specified in sub. (1) applies to services performed after ~~July 1, 1994~~ January 1, 2018.

(3) The payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable.

I. INTRODUCTION

The Sixth and Fourteenth Amendments to the U.S. Constitution obligate states to provide effective representation to the indigent accused at all critical stages of criminal or delinquency cases that carry loss of liberty as a potential punishment. However, unreasonably low attorney compensation rates interfere with a lawyers' ethical and constitutional obligations to give undivided loyalty to each and every defendant. Unreasonable compensation with no allowances for an attorney's overhead expenses, and flat fee contractual arrangements to represent the poor in criminal and delinquency courts, are constitutionally deficient because of financial conflicts of interests that pit an attorney's financial interests against the client's right to effective representation.

Wisconsin has the lowest assigned counsel compensation rates in the country due to decades of neglect by the legislature. The court should amend Supreme

Court Rule 81.02 and direct the State Public Defender to pay assigned counsel an hourly rate not less than $100/hour, to ban flat fee contracting, and, to require annual increases to the rate consistent with the consumer price index.

II. RIGHT TO COUNSEL APPOINTMENT PROCESS

By statute, Wisconsin provides counsel in the first instance to eligible indigent criminal defendants through the State Public Defender ("SPD"). When the SPD has a conflict of interest, or is otherwise unable to represent an eligible indigent defendant, representation is provided through counsel appointment and paid by the SPD. *See* Wis. Stats. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08. Nearly forty percent of all SPD cases are appointed to the private bar based on conflicts that preclude SPD staff representation. State Bar of Wisconsin Bi-Weekly Newsletter, *Inside Track,* v.7 n.6 (2015).

As discussed below, the quality of representation depends on the experience of the appointed attorney, the financial incentives in the compensation scheme and the case resources available to the attorney. Currently, the statutory compensation of $40/hour and flat rate contracting attracts mainly inexperienced attorneys who are incentivized to provide minimal representation to their financially poor clients in some counties.

Anecdotal examples of inadequate representation abound across the state – in both urban and rural areas - and are daily witnessed by judges and district attorneys who work in the criminal justice system. Raising the rate - and prohibiting flat rate contracting - will drastically improve the quality of attorneys willing to accept SPD appointments and prevent the reality of ineffective assistance of counsel that is occurring daily in the criminal courts of this state.

III. 2010 PETITION TO AMEND SCR 81.02

This court has been asked to address this issue before. On July 6, 2011, in its ruling on petition 10-03, this Court considered and rejected a request for a rule increasing the statutory rates for counsel appointed by the SPD. But in the course of ruling, this Court made several important holdings that make granting the request now, six years later, appropriate and necessary. First, this Court held that the question of the statutory appointed counsel rate is "an area of shared authority for the court and the legislature." *In the matter of the petition to amend Supreme Court Rule 81.02*, at 8 (attached as Exhibit 1). Second, this Court found that there was "extensive anecdotal evidence that supports [the petitioners'] assertion that funding shortfalls may compromise the right to effective assistance of counsel." (*Id*. at 9.) Finally, this Court observed that "our criminal justice system is reaching a breaking point" with regard to defense funding:

> "The resources available for the defense of poor people accused of crime has fallen alarmingly, potentially compromising our constitutional responsibility to

> ensure that every defendant stands equal before the law and is afforded the right to a fair trial guaranteed by our constitution. **If this funding crisis is not addressed, we risk a constitutional crisis that could compromise the integrity of our justice system.**"(*Id*.) (emphasis added).

Unfortunately, that funding crisis has not been addressed. Rather, rates for assigned counsel have remained stagnant, and hence have become even less adequate than they were when the Court declared that we were at risk of a "constitutional crisis." (*Id.*) And the result has been cases with wholly inadequate assigned counsel representing citizens facing even the most serious charges. The Court's concern that this looming constitutional crisis would "compromise the integrity of our justice system" has become a reality. (*Id.*)

IV. EMPIRICAL STUDIES REGARDING RATE INSUFFICIENCY

The instant petitioners seek this Court's intervention because the funding crisis has *not* been addressed since petition 10-03 in 2011, and we have reached a constitutional crisis wherein the Sixth Amendment is continuously jeopardized. Petitioners offer concrete, empirical evidence—not just anecdotes—of this crisis in the form of two studies released since 2011 that bring clarity to the "constitutional crisis": a) *Rationing Justice: The Underfunding of Assigned Counsel Systems,* National Association of Criminal Defense Lawyers (NACDL) (2013) (attached as Exhibit 2); and, b) *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin*, Sixth Amendment Center (6AC) (2014) (attached as Exhibit 3).

The NACDL study confirms that Wisconsin's assigned counsel rate is the lowest in the nation. (See Exhibit 2). The 6AC study demonstrates that Wisconsin's $40/hour compensation rate fails to even cover attorney overhead—causing attorneys to essentially work for free. (See Exhibit 3). This makes it nearly impossible to attract even average quality lawyers to perform this critical, constitutionally mandated, function. Courts across the country have repeatedly acted to increase appointed counsel rates when they fail to account for overhead or are confiscatory, as in Wisconsin. The 6AC study details—through a meticulous review of other states and a survey of Wisconsin appointed counsel—what this court previously heard only in anecdotal terms:

1. Wisconsin violates the ABA *Ten Principles*' demand that appointed counsel be paid both a "reasonable fee" and "actual overhead expenses" (6AC Finding #1)

    a. In 2002, the American Bar Association (ABA) promulgated *Ten Principles of a Public Defense Delivery System*—a set of ten standards that, in the words of the ABA, "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." (6AC at 4-5.)

b. In 2002, the American Bar Association (ABA) promulgated *Ten Principles of a Public Defense Delivery System*—a set of ten standards that, in the words of the ABA, "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." (6AC at 4-5.)

c. SPD's assigned counsel division pays attorneys in one of two ways: (1) the $40 hourly rate with no allotment for overhead; or, (2) a flat, per-case contracted amount. Both methods fail the *Ten Principles* as detailed below. (*Id*.)

d. Wisconsin

i According to a 2013 State Bar of Wisconsin analysis, the average overhead for a Wisconsin lawyer is $102,050. (*Id*. at 6.) As shown below, even if such a lawyer is able to bill 2000 hours per year he or she would still fall over $20,000/yr. short of meeting that overhead. (*Id*.)

ii. In 1978, when the legislature established the State Public Defender's role in the circuit courts, the hourly rate of compensation for appointed lawyers was $35 ($25 for travel time). In 1992, the legislature increased private bar compensation to $50 for in-court time and $40 for out-of-court time; travel time remained unchanged at $25. However, in 1995, the legislature *reduced* the in-court rate to create a uniform $40 hourly rate. Again, the $25 hourly rate for travel remained unchanged. The 1995 structure continues to apply today. (*Id*.[1])

e. Accordingly, several state courts have demanded a reasonable fee in addition to overhead expenses, as detailed below.

i. Kansas: In 1987, the Kansas Supreme Court ordered that the state has an "obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses." The court established, *in 1987*, that overhead was $30.00/hour and ordered the rate to be established at $80.00/hour. (*Id*.)

ii. Alaska: "We thus conclude that requiring an attorney to represent an indigent criminal defendant for only nominal

[1] *See* Exhibit 3 (a summary of legislative attempts to increase the rate since 1995) and Exhibit 4 (a summary of SPD budget proposals to increase the rate every biennium since 1995).

compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole." *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (1987). So stated the Alaska Supreme Court in 1987 because doing so would be taking "private property for a public purpose without just compensation." (6AC at 7.)

iii. West Virginia: The West Virginia Supreme Court determined in 1989 that court appointed attorneys in that state were forced to "involuntarily subsidize the State with out-of-pocket cash" because the then-current rates did not cover attorney overhead. *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989). "Perhaps the most serious defect of the present system," the West Virginia Court determined, "is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial." In 1989, the court set the rate at $45.00/hour out of court and $65.00/hour in court. (6AC at 7.)

iv. Mississippi: In 1990, the Mississippi Supreme Court determined that indigent defense attorneys are entitled to "reimbursement of actual expenses" in addition to a reasonable sum, and defined "actual expenses" to include "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case." *Wilson v. State*, 574 So.2d 1338 (Miss. 1990). The court set the rate for overhead at $25.00/hour. (6AC at 7.) The Mississippi overhead rate has been subsequently increased to $32.50 per hour.

v. Oklahoma: In the same year as the Mississippi decision, the Oklahoma Supreme Court echoed the 1987 Kansas decision in finding that state government "has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses." *State v. Lynch*, 796 P.2d 1150 (Okla. 1990). The court held that "[a]s a matter of course, when the district attorneys' . . . salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel." The Oklahoma Court also determined that a "provision must be made for compensation of defense counsel's reasonable overhead and out of pocket expenses." The overhead costs for the Oklahoma attorneys in 1989 were between $50.88 per hour and $48.00 per hour. This is in addition to the reasonable fee, making the total

compensation rate between $62.63 and $80.14—in 1989. (SAC at 8.)

vi. New York: Landmark litigation in New York City in 2003 announced that "[e]qual access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded." *N.Y. County Lawyer's Ass'n v. State*, 192 Misc. 2d 424, 425 (N.Y. Sup. Ct. 2002). Deriding the "pusillanimous posturing and procrastination of the executive and legislative branches" for failing to raise the rate for more than 17 years, the court determined that the other two branches of government created an assigned counsel "crisis" that impairs the "judiciary's ability to function." The low compensation was found to result "in denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation." The following year the rate was statutorily raised to $75.00/hour. (6AC at 8-9.)

vii. Alabama: In 1993, the Alabama Court of Criminal Appeals determined in *May v. State* that indigent defense attorneys were entitled to overhead expenses of $30 per hour in addition to a reasonable fee. *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993). In *Wright v Childree*, the Alabama Supreme Court determined that assigned counsel are entitled to a reasonable fee in addition to overhead expenses. *Wright v. Childree*, 972 So. 2d 771 (Ala. 2006). After this litigation, the Alabama Legislature increased the hourly rate to $70 per hour. (6AC at 9-10.)

viii. South Dakota**:** in 2000, the South Dakota Supreme Court set public counsel compensation hourly rates at $67 per hour. To ensure that attorneys were perpetually paid both a reasonable fee and overhead, the Court also mandated that "court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature." Assigned counsel compensation in the farmlands of South Dakota now stands at $84 per hour—more than double the pay for attorneys in Wisconsin. (*Id*. at 10.) As of December 2016, the South Dakota assigned counsel compensation rate is $94/hour. (See: http://ujs.sd.gov/uploads/docs/2017CourtAppointedAttorneyFees.pdf)

2. Wisconsin violates the ABA *Ten Principles*' prohibition on contracts let solely on cost (6AC Finding #2)

   a. Fixed fee contracts that require lawyers to be paid "the same amount, no matter how much or little he works on each case," causes conflicts because it is in the lawyer's "personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work." (*Id*. at 13.)

   b. "As of February 2014, SPD employed 58 fixed-fee contracts compensating attorneys at a rate between $248 and $362 per case (depending on the county). Do these Wisconsin contractual arrangements produce financial incentives to triage work in favor of some defendants, but in detriment of others? The answer is 'yes.'" (*Id*.)

   c. "Even in the average misdemeanor case, the attorney must be able to, among other tasks: meet with and interview with the client; attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client); keep the client informed throughout the duration of proceedings; prepare for and appear at the arraignment, wherein he must preserve his client's rights; request and review formal and informal discovery; launch an investigation, scouring all sources of potential investigative information in the process, and as soon as possible; research the law; develop and continually reassess the theory of the case; file and argue on behalf of pretrial motions; read and respond to the prosecution's motions; negotiate plea options with the prosecution, including sentencing outcomes; and all the while preparing for the event that the case may be going to trial and possibly sentencing." (*Id*. at 13-14.[2]) Fixed fee contracting makes it financially impractical and infeasible for lawyers to provide these essential services to their clients.

   d. Accordingly, several states have barred fixed fee contracting, as detailed below.

      i. Idaho: Idaho requires that representation shall be provided through a public defender office or by contracting with a private defense attorney "provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney." I.C. § 19-859 (codified in 2014). (6AC at 14.)

[2] *See also* National Association of Criminal Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll on America's Broken Misdemeanor Courts* 22 (2009), *available at* https://www.nacdl.org/reports/misdemeanor/; Wisconsin State Public Defender*, Minimum Attorney Performance Standards,* http://wispd.org/images/ACD_Forms/Minimum_Attorney_Performance_Standards_Private_Bar.pdf.

ii. Michigan: In establishing minimum standards, rules, and procedures, the Michigan Indigent Defense Commission is statutorily barred from approving indigent defense plans that provide "economic disincentives," and the statute further states that "incentives that impair defense counsel's ability to provide effective representation shall be avoided." Mich. Stat. Ann. § 780.991(2)(b). (6AC at 14-15.)

iii. South Dakota**:** The South Dakota Unified Judicial System Policy 1-PJ-10, issued by the state supreme court, not only set a reasonable hourly rate that "will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature," but also banned flat fee contracting. The policy requires that "[a]ll lawyers . . . be paid for all legal services on an hourly basis." (6AC at 15.)

iv. Washington: A federal court in 2013 called the use of very low rate flat fee contracts in two cities in Washington State prior to a supreme court ban an "intentional choice" that purposefully "left the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable." *Wilbur v. Mount Vernon,* No. C11-1100RSL, at *15 (W.D. Wash. Dec. 2013), *available at* http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf. (6AC at 15.)

v. Nevada: Since the publication of the 6AC report, the Nevada Supreme Court also banned flat fee contracting: http://sixthamendment.org/nevada-supreme-court-bans-flat-fee-contracting/

3. Unreasonably low attorney compensation rates interfere with a lawyers' ethical obligation to give undivided loyalty to each and every defendant (6AC Finding #3)

a. At its July 2000 meeting, the ABA House of Delegates adopted a resolution reaffirming the core value of the legal profession. The resolution calls on lawyers to maintain "undivided loyalty" to the client and to "avoid conflicts of interest" with the client. (*Id*. at 16.)

b. A lawyer shall not permit a person that pays the lawyer to render legal services to "regulate the lawyer's professional judgment in rendering such legal services." (*Id.*) The *Model Rules* have since been adopted by the state bar associations in 49 of 50 states, plus the District of Columbia (including Wisconsin). (*Id*.)

c. In a 1979 case, *Ferri v. Ackerman*, the United States Supreme Court determined that "independence" of appointed counsel to act as an adversary is an "indispensible element" of "effective representation." *Ferri v. Ackerman*, 444 U.S. 193 (1979), *available at* http://www.oyez.org/cases/1970-1979/1979/1979_78_5981.

d. Two years later, the Court determined in *Polk County v. Dodson* that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages." *Polk County v. Dodson*, 454 U.S. 312 (1981), *available at* http://www.oyez.org/cases/1980-1989/1981/1981_80_824. Observing that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client." *Id*.

e. This principle is confirmed in *Strickland v. Washington*. In that case, the Court states that "independence of counsel" is "constitutionally protected," and that "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 688 (1984), *available at* http://www.oyez.org/cases/1980-1989/1983/1983_82_1554.

f. Both unreasonable compensation with no allowances for overhead expenses and flat fee contractual arrangements to represent the poor in criminal courts are constitutional violations precisely because each pits the attorney's financial well-being against the client's right to conflict-free representation. A lawyer can be pushed into thinking about how to make the representation profitable in addition to, and potentially in opposition to, the interests of the client. (6AC at 17.)

4. Concerns over separation of powers do not prevent the Wisconsin Supreme Court from increasing assigned counsel rates through judicial rule. (6AC Finding #4)

a. Despite the Court's "sincere concern" and recognition of the "extensive anecdotal evidence" that "shortfalls may compromise the right to effective assistance of counsel" in Wisconsin, this Court in 2011 denied petition 10-03, in part because of "a particularly challenging budgetary environment" for the legislature at that time. *In the matter of the petition to amend Supreme Court Rule 81.02*, at 9. However, the legislature's failure to act to increase the assigned counsel rate for more than twenty years spans periods of budgetary surplus as well as the more challenging environment the court took note of in 2010, when the state was still recovering from the last

recession. In times of surplus, as well as the last six years, the legislature instead returned money to the taxpayers through various means rather than adequately fund the ACD caseload. Tax reductions are certainly a laudable goal, but not at the expense of the state's constitutional obligations under *Gideon v. Wainwright,* 372 U.S. 335 (1963).

b. There is no separation of powers concern here. This court recognized that it has "shared authority" in this area with the legislature. *Id.* at 8. And this Court has inherent power to ensure the effective administration of justice in the State of Wisconsin. *See, e.g., State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995). The Wisconsin constitution grants the

> …supreme court power to adopt measures necessary for the due administration of justice in the state, including assuring litigants a fair trial, and to protect the court and the judicial system against any action that would unreasonably curtail its powers or materially impair its efficacy. Such power, properly used, is essential to the maintenance of a strong and independent judiciary, a necessary component of our system of government. In the past, in the exercise of its judicial power this court has regulate the court's budget, court administration, the bar, and practice and procedure, has appointed counsel at public expense, has created a judicial code of ethics and has disciplined judges.

State v. Holmes, 106 Wis. 2d 31, 44-45, 315 N.E.2d 703, 710 (1982). Forty years of active indifference by the executive and legislative branches has materially impaired the administration of justice in this state.

c. The Court should not fear that adopting a court rule increasing pay will necessarily result in forcing the legislature to expend more money. The Wisconsin legislature can, for instance, find other ways to offset the increased costs required to fulfill the constitutional command of access to competent, conflict-free counsel. The legislature could, for example, offset the expenses by increasing reliance on diversion that could move juvenile and adult defendants out of the formal criminal justice system and provide help with potential drug or other dependencies. Similarly, lawmakers can change low-level, non-serious crimes to "citations"—in which the offender is given a ticket to pay a fine rather than being threatened with jail time thus triggering the constitutional right to counsel. (6AC at 21.)

d. But if the failure to pay a reasonable rate creates financial conflicts of interests that result in lawyers triaging the Sixth Amendment duty they owe to some clients in favor of others, then Wisconsin is in violation of the U.S. Constitution—a situation the policymakers may want to redress to avoid costly systemic litigation.

V. FEDERAL GOVERNMENT

The United States Department of Justice has determined that Courts may act preemptively to prevent constructive denial of counsel rather than waiting to resolve issues retrospectively through *Strickland*.

1. On September 25, 2014, the DOJ filed a Statement of Interest[3] in a class action lawsuit, *Hurrell-Harring v. New York*, brought by the New York Civil Liberties Union (NYCLU) alleging a systemic denial of counsel in five upstate New York counties.[4] The Statement of Interest provides DOJ's expertise to the court on what constitutes a "constructive" denial of counsel under the Sixth Amendment. In short, the DOJ statement establishes that a court does not have to wait for a case to be disposed of and then try to unravel retrospectively whether a specific defendant's representation met the aims of *Gideon* and its progeny. If state or local governments create structural impediments that make the appointment of counsel "superficial" to the point of "non-representation," a court can step in and presume prospectively that the representation is ineffective. The types of government interference enunciated in the DOJ Statement of Interest include (but most assuredly are not limited to): "a severe lack of resources," "unreasonably high caseloads," "critical understaffing of public defender offices," and/or anything else making the "traditional markers of representation" go unmet (i.e., "timely and confidential consultation with clients," "appropriate investigations," and adversarial representation, among others).

2. In another Statement of Interest[5] filed August 14, 2013, in *Wilbur v. City of Mount Vernon*, the DOJ comments specifically on the issue of public defense attorneys having sufficient time to provide adequate representation. At the heart of the *Wilbur* case was the issue of how

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[3] Statement of Interest of the United States, *Hurrell-Harring v. New York* (N.Y. Sup. Ct. Oct. 21, 2014) (No. 8866-07), *available at* http://www.justice.gov/sites/default/files/press-releases/attachments/2014/09/25/statement_of_interest.pdf.

[4] In March 2015, the case settled on the eve of trial with the State of New York agreeing to pay 100% of all indigent defense costs in the counties that were named defendants. Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. filed Oct. 21, 2014). The state agreed to pay $5.5 million in attorneys' fees and costs to the NYCLU and the law firm representing the plaintiffs**.** The lawsuit settlement has sparked greater advocacy for the state to pick up 100% of all indigent defense costs in the remaining upstate counties.

[5] Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, *available at* http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf.

excessive caseloads of public defense attorneys resulted in deficient representation under the Sixth Amendment to the U.S. Constitution. At the time the original complaint was filed in 2011, the cities of Mt. Vernon and Burlington, Washington, jointly contracted with two private attorneys to represent indigent defendants in their municipal courts, as they had done "for nearly a decade." Under the contract, the two attorneys served together as "the public defender" and were paid a flat annual fee out of which they had to provide all "investigative, paralegal, and clerical services" without any additional compensation. In other words, the more work and non-attorney support they dedicated to their clients' cases, the less each attorney's take-home pay. And each contracting attorney handled between 950 and 1,150 appointed cases each year, in addition to maintaining a healthy private practice on the side. With such heavy caseloads, the contract defenders were alleged to "regularly fail to return calls" or "meet with" or "interview" their clients, and "rarely, if ever, investigate the charges made against" their clients. And the cities' failure to adequately "monitor and oversee" the system they operated by way of the contract amounted to a "construct[ive] denial of the right to counsel" as guaranteed under *Gideon*. The judge in the federal lawsuit challenging the constitutionality of the indigent defense services in two Washington cities, noted that "no hard and fast number of pretrial motions or trials is expected," but when hardly any motions are ever filed and the number of trials is "incredibly small" it is a "sign of a deeper systemic problem." *Wilbur v. Mount Vernon,* No. C11-1100RSL (W.D. Wash. Dec. 2013), *available at* http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf.

3. The DOJ has twice filed amicus briefs furthering their position on constructive denial of counsel. Most recently, on May 12, 2016, DOJ filed an amicus brief[6] in the Supreme Court of Idaho in *Tucker v. Idaho*, in which the ACLU of Idaho alleges systemic denial of counsel for the indigent accused. As in *Hurrell-Harring*, the DOJ states in *Tucker* that a "constructive denial of counsel violating *Gideon* occurs where the traditional markers of representation are frequently absent or significantly compromised as a result of systemic, structural limitations."

   On September 11, 2015, the DOJ filed an amicus brief[7] in *Kuren v. Luzerne County* at the Pennsylvania Supreme Court. The *Kuren* class action lawsuit alleged that the county so poorly funded right to counsel services as to constructively deny counsel to the indigent accused. The DOJ amicus brief makes clear that a civil constructive denial of counsel claim is an "effective way for litigants to seek to effectuate the promise of *Gideon*," and "[p]ost-

[6] Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *Tucker v. Idaho*, No. 43922-2016 (Idaho filed May 11, 2016).

[7] Brief for the United States as Amicus Curiae in Support of Appellants, *Kuren v. Luzerne County*, Nos. 57 MAP 2015, 58 MAP 2015 (Pa. Sept. 10, 2015), *available at* http://www.justice.gov/opa/pr/department-justice-files-amicus-brief-pennsylvania-right-counsel-case.

conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders."

4. The DOJ has also made clear that its *Cronic* analysis applies equally to juvenile delinquency proceedings, through its Statement of Interest[8] in *N.P. v. Georgia*, filed March 13, 2015. The Southern Center for Human Rights ("SCHR") filed the class action lawsuit alleging that children were regularly denied their right to counsel and instead treated to "assembly-line justice" in the Cordele Judicial Circuit. According to SCHR, kids regularly appeared in court without lawyers, and those who did receive representation were assigned lawyers who did not have time to talk with them before court. The suit claimed that the Cordele Circuit Public Defender Office was structurally unable to provide meaningful representation due to chronic underfunding and understaffing. The DOJ Statement provides the trial court with a *Cronic* framework to evaluate the claims.[9]

5. The Federal Government pays assigned counsel attorneys an hourly rate of $132/hour in non-capital cases and $185/hour for capital cases. The rates include both a reasonable fee and overhead. See: http://www.uscourts.gov/services-forms/defender-services

VI. ATTORNEY SURVEY

To discover whether such negative impacts exist in Wisconsin in relation to the low attorney compensation rate, the authors of the 6AC report conducted a survey of Wisconsin lawyers, including attorneys who currently take cases and those who no longer take cases for any reason. 378 lawyers filled out the survey.

1. Nearly one half of respondents (49.4%) stated that they represent fewer public defender appointed clients than in the past. Another 6.8% of respondents stated that they no longer take SPD appointed cases at all. *Id*.

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[8] Statement of Interest of the United States, *N.P. v. Georgia* (Ga. Super. Ct. filed Mar. 13, 2015) (No. 2014-CV-241025), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np_v_state_of_georgia_usa_statement_of_interest.pdf.

[9] A month after the DOJ filed its statement of interest, on April 20, 2015 the defendants in the class action lawsuit – the Georgia Public Defender Standards Council, the Cordele Circuit Public Defender, and the four counties in the circuit – agreed to settle the matter with SCHR. Consent Decree, *N.P. v. Georgia*, No. 2014-CV-241025 (Ga. Super. Ct. filed Apr. 20, 2015). The approved consent decree seeks to address a number of structural flaws. Specifically, it will: increase the size of the public defender's office staff; require public defenders to meet with clients (a) within three days of their detainment to determine indigency, and (b) within three days of assignment to their case; and require defenders to receive training, including specific training for juvenile defenders. The consent decree requires public defenders to advise juvenile defendants seeking to waive their right to counsel what a lawyer could do for them, and also requires the public defender office to comply with the terms of the Georgia Indigent Defense Act of 2003 including by creating a specialized juvenile division.

2. There are two distinct classes of appointed attorneys: (a) those attorneys who take occasional cases (perhaps out of some perceived duty to the Court or SPD); and (b) those lawyers who represent a significant number of SPD defendants. *Id*. it may not even be that the attorneys are trying to make the work "more profitable" by triaging cases; the attorneys could simply be trying to make them not a loss.

3. However, surveyed attorneys reported that they spend 37% less time, on average, meeting with their appointed clients than they do with their retained clients. (*Id*.) The Wisconsin survey revealed that attorneys who have a higher number of public defender cases tend not to file motions in their cases, and they are more likely to resolve cases by their public defender clients pleading to the offense charged. This suggests that attorneys with many SPD cases are prioritizing speed in order to make representation more profitable. (6AC at 17.)

VII. LEGISLATIVE HISTORY

As detailed above and in Exhibits 3 and 4, the history of attempts to raise the private bar rate is one of failure. This includes extensive attempts at individual bills in the legislature and SPD budget requests every biennium since 1995.

The requested amounts have varied but the failing result is the same whether there's a Republican or Democratic governor and/or whether one party controls either or both house of the legislature, and in strong economic times or challenging budgetary environments. Shamefully, Wisconsin has allowed itself to sink to the very bottom of the fifty states in hourly compensation for appointed counsel in indigent criminal cases.

VIII. MILWAUKEE JOURNAL-SENTINAL INVESTIGATION

On April 21, 2017, the *Milwaukee Journal Sentinal* published[10] the results of an investigative report by Jacob Carpenter revealing:

1. Between 2010 and 2016, the "data shows about 100 lawyers accepted at least 50 felony case appointments without using a private investigator over that time. Several lawyers were assigned more than 200 felony appointments without billing for an investigator. One lawyer topped 300 cases."

2. "In addition, a few dozen lawyers took 50-plus felony appointments and almost never billed for investigators. One lawyer, for example, accepted about 300 felony cases and billed for seven hours of investigator work."

[10] (See: http://www.jsonline.com/story/news/investigations/2017/04/21/investigator-couldve-kept-him-out-prison-thousands-similar-clients-arent-getting-one/100500922/)

3. “Lawyers also have spurned investigators on the most serious types of cases, the analysis shows. The Journal Sentinel found at least 15 homicide cases, dozens of armed robbery cases and nearly 200 sexual assault cases in which indigent defendants were represented by lawyers who rarely or never billed for investigators.”

IX. CONCLUSION

Poor people accused of crimes in Wisconsin have a constitutional right to effective assistance of counsel who is not conflicted by competing economic interests. This court should, following decades of neglect by the legislature, exercise its shared authority to direct that the SPD pay assigned counsel an hourly rate of $100/hour - commensurate with national averages - ban SPD contracting and set automatic annual increases equal to the consumer price index and adopt the proposed SCR 81.02 amendments.

WHEREFORE, the petitioners request the Court to adopt the proposed amendment to SCR 81.02 and to grant such other relief as the Court may deem necessary.

Dated at Milwaukee, Wisconsin this 25th day of May, 2017.

/s/John A. Birdsall
John A. Birdsall
Wisconsin Bar No. 1017786
Birdsall Law Offices, S.C.
Riverfront Plaza
1110 N. Old World Third St.
Suite 218
Milwaukee, WI 53203
(414)-831-5465

/s/ Henry R. Schultz
Henry R. Schultz
Wisconsin Bar No. 1003451
Schultz Law Office
300 E Pioneer St
PO Box 42
Crandon WI 54520-0042
(715) 804-4559